

**United States Department of Labor
Employees' Compensation Appeals Board**

A.L., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Elmont, NY, Employer**

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**Docket No. 07-1882
Issued: December 6, 2007**

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chief Judge
DAVID S. GERSON, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On July 5, 2007 appellant filed a timely appeal from a May 14, 2007 Office of Workers' Compensation Programs' nonmerit decision which denied appellant's reconsideration request on the grounds that it was untimely filed and failed to establish clear evidence of error. Because more than one year has elapsed between the last merit decision dated November 5, 2004 and the filing of this appeal on July 5, 2007 the Board lacks jurisdiction to review the merits of appellant's claim pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d)(2).

ISSUE

The issue is whether the Office properly determined that appellant's request for reconsideration was untimely filed and did not demonstrate clear evidence of error.

FACTUAL HISTORY

This is the second appeal before the Board. On September 21, 1999 appellant, then a 39-year-old letter carrier, injured his lower back while in the performance of duty. The Office accepted a claim for lumbar sprain. On February 8, 2003 appellant filed a Form CA-2a claim for

recurrence of disability. By decision dated June 16, 2003, the Office denied his claim for a recurrence of disability. By decision dated November 5, 2004, an Office hearing representative affirmed the June 16, 2003 Office decision. By nonmerit decision dated November 16, 2005, the Office denied appellant's request for reconsideration. In a September 1, 2006 decision,¹ the Board affirmed the Office's November 16, 2005 decision. The complete facts of this case are set forth in the Board's September 1, 2006 decision and are herein incorporated by reference.

In a letter dated April 6, 2007, appellant requested reconsideration of the November 5, 2004 Office decision. He listed eleven different facts pertaining to the November 5, 2004 decision, which in essence, indicated that he sustained a recurrence of disability in February 2003. Appellant also contended that the transcript of his July 29, 2004 hearing was not accurate which warranted the reversal of the November 5, 2004 decision of the Office hearing representative. In addition, he submitted copies of medical reports which were considered and rejected in previous Office and Board decisions.

By decision dated May 14, 2007, the Office denied appellant's request for reconsideration without a merit review, finding that he had not timely requested reconsideration and had failed to submit factual or medical evidence sufficient to establish clear evidence of error. The Office stated that appellant was required to present evidence which showed that the Office made an error and that there was no evidence submitted that showed that its final merit decision was in error.

LEGAL PRECEDENT

Section 8128(a) of the Federal Employees' Compensation Act² does not entitle an employee to a review of an Office decision as a matter of right.³ This section, vesting the Office with discretionary authority to determine whether it will review an award for or against compensation, provides:

“The Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application. The Secretary, in accordance with the facts found on review may --

- (1) end, decrease or increase the compensation previously awarded; or
- (2) award compensation previously refused or discontinued.”

¹ Docket No. 06-784 (issued September 1, 2006).

² 5 U.S.C. § 8128(a).

³ *Jesus D. Sanchez*, 41 ECAB 964 (1990); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989), *petition for recon. denied*, 41 ECAB 458 (1990).

The Office, through its regulations, has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a).⁴ As one such limitation, the Office has stated that it will not review a decision denying or terminating a benefit unless the application for review is filed within one year of the date of that decision.⁵ The Board has found that the imposition of this one-year time limitation does not constitute an abuse of the discretionary authority granted by the Office under 5 U.S.C. § 8128(a).⁶

In those cases where a request for reconsideration is not timely filed, the Board had held however that the Office must nevertheless undertake a limited review of the case to determine whether there is clear evidence of error pursuant to the untimely request.⁷ Office procedures state that the Office will reopen the claimant's case for merit review, notwithstanding the one-year filing limitation set forth in 20 C.F.R. § 10.607(b), if appellant's application for review shows "clear evidence of error" on the part of the Office.⁸

To establish clear evidence of error, an appellant must submit evidence relevant to the issue which was decided by the Office.⁹ The evidence must be positive, precise and explicit and must be manifested on its face that the Office committed an error.¹⁰ Evidence which does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.¹¹ It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.¹² This entails a limited review by the Office of how the evidence submitted with the reconsideration request bears on the evidence previously of record and whether the new evidence demonstrates clear error on the part of the Office.¹³ To show clear evidence of error, the evidence submitted must not only be of sufficient probative value to create a conflict in medical opinion or establish a clear procedural error, but must be of sufficient probative value to *prima facie* shift the weight of the evidence in favor of the claimant and raise a substantial question as to the correctness of the Office's decision.¹⁴ The Board makes

⁴ Thus, although it is a matter of discretion on the part of the Office whether to review an award for or against payment of compensation, the Office has stated that a claimant may obtain review of the merits of a claim by (1) showing that the Office erroneously applied or interpreted a point of law, or (2) advances a relevant legal argument not previously considered by the Office; or (3) constituting relevant and pertinent new evidence not previously considered by the Office. See 20 C.F.R. § 10.606(b).

⁵ 20 C.F.R. § 10.607(b).

⁶ See cases cited *supra* note 3.

⁷ *Rex L. Weaver*, 44 ECAB 535 (1993).

⁸ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(b) (May 1991).

⁹ See *Dean D. Beets*, 43 ECAB 1153 (1992).

¹⁰ See *Leona N. Travis*, 43 ECAB 227 (1991).

¹¹ See *Jesus D. Sanchez*, *supra* note 3.

¹² See *Leona N. Travis*, *supra* note 10.

¹³ See *Nelson T. Thompson*, 43 ECAB 919 (1992).

¹⁴ *Leon D. Faidley, Jr.*, *supra*, note 3.

an independent determination of whether an appellant has submitted clear evidence of error on the part of the Office such that the Office abused its discretion in denying merit review in the face of such evidence.¹⁵

ANALYSIS

The Board finds that the Office properly determined, in this case, that appellant failed to file a timely application for review. The Office issued its most recent merit decision in this case on November 5, 2004. Appellant requested reconsideration on April 6, 2007; thus, appellant's reconsideration request is untimely as it was outside the one-year time limit.

The Board notes that a claimant must submit both a timely request for reconsideration and new and relevant medical evidence within one year of the most recent merit decision of the Office.¹⁶

The Board finds that appellant's April 6, 2007 request for reconsideration failed to establish clear evidence of error. The medical reports appellant submitted were previously considered by the Office in prior decisions; these reports are cumulative and repetitive of reports previously rejected by the Office. No other evidence was received by the Office. Further, appellant merely restates previously rejected arguments in his April 6, 2007 letter. He has provided no support for his assertion that the July 29, 2004 hearing transcript contained errors which warranted a reversal of the November 5, 2004 hearing representative's decision. Therefore, appellant has failed to demonstrate clear evidence of error on the part of the Office.

The Office reviewed the evidence appellant submitted and properly found it to be insufficient to *prima facie* shift the weight of the evidence in favor of appellant. Consequently, the evidence submitted by appellant on reconsideration is insufficient to establish clear evidence of error on the part of the Office such that the Office abused its discretion in denying merit review. The Board finds that the Office did not abuse its discretion in denying further merit review.

¹⁵ *Gregory Griffin*, 41 ECAB 186 (1989), *petition for recon. denied*, 41 ECAB 458 (1990).

¹⁶ See *Richard J. Chabot*, 43 ECAB 357 (1991). See also 20 C.F.R. § 10.606(b), which states: "(a) An employee (or representative) seeking reconsideration should send the application for reconsideration to the address as instructed by [the Office] in the final decision. (b) The application for reconsideration, including all supporting documents, must:

- (1) Be submitted in writing;
- (2) Set forth arguments and contain evidence that either:
 - (i) Shows that [the Office] erroneously applied or interpreted a specific point of law;
 - (ii) Advances a relevant legal argument not previously considered by [the Office]; or
 - (iii) Constitutes relevant and pertinent new evidence not previously considered by [the Office].

CONCLUSION

The Board finds that appellant has failed to submit evidence establishing clear error on the part of the Office in his reconsideration request dated April 6, 2007. Inasmuch as appellant's reconsideration request was untimely filed and failed to establish clear evidence of error, the Office properly denied further review on May 14, 2007.

ORDER

IT IS HEREBY ORDERED THAT the May 14, 2007 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: December 6, 2007
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

David S. Gerson, Judge
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board